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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4721

BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

versus

CHARLES WHEATLEY COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September, 1975

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Federal Statute Involved	2
Statement of Facts	3
Reasons for Granting Writ and Argument	4
Conclusion	14
Appendix A (Opinion of Fifth Circuit Court of Appeals)	1a
Appendix B (Order Denying Rehearing, 5th Cir., Court of Appeals)	11a
Appendix C (Judgment, U.S. District Court, Western District of Louisiana)	13a
Appendix D (Comparison of Sandoval and ODECO cases cited on Page 6)	15a

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Cases:

Drake v. Treadwell Construction Co. v. U.S., (1963) 373 U.S. 772, 10 L.Ed.2d 136, 83 S.Ct. 1102, 299 F.2d 789 11

Federal Marine Term., Inc. v. Burnside Ship. Co., (1969) 394 U.S. 404, 421, 89 S.Ct. 1144, 1149, 1153, 1154, 22 L.Ed.2d 371 11

Hart v. Simmons, (1963) 223 F.Supp. 109 12

Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service, 377 F.2d 511 (1967) 6

AUTHORITIES CITED (Continued)

Page

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Sandoval v. Mitsui Sempaku K.K. Tokyo, (1972) 460 F.2d 1163 6

Tri-State Oil Tool Indust. Inc. v. Delta Marine Drilling Co., 410 F.2d 178 12,13,14

Wallenius Bremen v. U.S., (1969) 409 F.2d 994, 12 ALF Fed 606, cert. den 398 U.S. 958, 26 L.Ed.2d 542, 90 S.Ct. 2164 12

Weyerhaeuser Steamship Co. v. U.S., (1963) 372 U.S. 597, 10 L.Ed.2d 1, 83 S.Ct. 926 9,10,11

Other Authorities:

33 USCA § 905 (L&HWC Act) 2,4,5,6,7,9,10,11

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Prosser on Torts, § 48 at 279 (3d ed.) 13

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The petitioners, BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, reported in 512 F.2d 486, appears at Appendix A, infra, pp. 1a-11a; a rehearing was denied and reported in 515 F.2d 1184, appears at Appendix B, infra, p. 11a-12a; the lower court, the United States District Court for the Western District of Louisiana, Lafayette Division, rendered judgment without a written opinion, and said judgment appears at Appendix C, infra, p. 13a-14a.

JURISDICTION

The order of the Court of Appeals sought to be reviewed was entered on May 5, 1975. See Appendix A, p. 1a, infra. A rehearing of said judgment was denied by said Court on June 30, 1975 (citation of panel decision, WDLA 512 F.2d 486). See Appendix B, p. 11a, infra. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

The important issue presented for review is whether or not the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905) bars the claim of an unrelated third party for indemnity or contribution against the employer of its injured employee.

FEDERAL STATUTE INVOLVED

The so-called "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905) (hereinafter referred to as L&HWC Act), which is involved here, provides, as follows:

> "33 § 905. Exclusiveness of Liability
> "(a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to

recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee."

STATEMENT OF FACTS

Petitioner, BETTIS CORPORATION, manufactured a component part, known as an actuator, of a pipeline apparatus which ruptured, causing fatal injuries to Murray White, an employee of CHARLES WHEATLEY COMPANY. Murray White's widow and daughter brought a tort action for damages against Texas Eastern Transmission Corporation, the owner of the pipeline located on an offshore drilling platform in the Gulf of Mexico; Bettis Corporation; and their insurers. Bettis Corporation and its insurer filed a third party complaint against Charles Wheatley Company, Murray White's employer, seeking indemnity or contribution in tort. The United States District Court for the Western District of Louisiana, Richard J. Putnam, J., rendered a final judgment under Rule 54(b), dismissing this third party claim on a motion filed by

Wheatley. On appeal the lower court's judgment was affirmed by the Fifth Circuit Court of Appeals and a rehearing was applied for and denied.

At the time of Murray White's fatal injuries, he was in the process of working on the apparatus assembled by Charles Wheatley Company, which was a part of Texas Eastern's gas transmission line. Murray White's widow has collected Longshoremen's and Harbor Workers' Compensation benefits from the insurer of his employer, Charles Wheatley Company, and said insurer has intervened in this case to recover the amount paid and to be paid in the future. The basis of the lower court's dismissing Bettis' third party action against Wheatley was essentially that Bettis was not entitled to tort indemnity from Wheatley grounded on the so-called "exclusivity provision" of the L&HWC Act.

Federal jurisdiction in the Court of first instance is based on diversity, inasmuch as the plaintiffs were residents of Louisiana and the defendants, Texas Eastern Transmission Corporation, Bettis Corporation and their insurers, were domiciled and had their principal place of business in other States.

REASONS FOR GRANTING WRIT AND ARGUMENT

There are two important reasons for the granting of this writ, viz:

(1) The so-called "exclusivity provision" of the L&HWC Act is for all practical purposes identical with the provisions to the same effect in the Federal Employees Compensation Act (5 U.S.C. § 8116(c)), hereinafter referred to as FECA. In fact the whole pur-

pose of both acts is the same in that they are both Federal Compensation laws designed to give speedy and certain relief to injured workmen or their dependents in the case of death. One, to protect the interest of the longshoremen, and the other, that of Federal employees. A side-by-side comparison of the pertinent provisions of these two acts illustrate this point, viz:

"33 § 905. Exclusiveness of Liability

"(a) The liability of an employer prescribed in Section 904 of this title shall be eclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death*, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee." (Emphasis ours)

"5 § 8116. Limitations on right to receive compensation

"(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and *any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding*, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel." (Emphasis ours)

Despite the almost identical language used in Section 905 of the L&HWC Act and Section 8116(c) of the FECA, there has been a split in decisions in several of the various Circuits of the Court of Appeals in interpreting this so-called "exclusivity provision" of the FECA in that some courts have allowed third party tort indemnity under facts similar to this case, while others have not.

It is important to note that cases in the Third and Fourth Circuits and one in the Fifth Circuit have allowed indemnity or contribution, whereas cases in the First, Second, Ninth and District of Columbia Circuits have denied it. (12 ALR Fed, § 2[b], p. 620, and § 5 and 6, pp. 624-628)

The Fifth Circuit Court of Appeals in one instance has interpreted the FECA so as to allow indemnity to an unrelated third party (*Sandoval v. Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163, (1972)), and denied it in L&HWC cases — in this case (512 F.2d 486) and in *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 377 F.2d 511 (1967)). See Appendix D, pp. 15a and 16a, for a comparison of these two cases. Petitioners, therefore, submit that because of these conflicts and particularly in the Court of Appeals for the Fifth Circuit, the pending case justifies a review by this Court.

(2) The second important reason a writ should be granted in this case is that the First, Second, Fifth, Ninth and District of Columbia Circuits of the Court of Appeals, in deciding that the "exclusive liability" provision of the L&HWC Act bars recovery by a third party against a negligent employer, is in essence in conflict with applicable decisions of this Court.

In a series of decisions this Court has carefully considered the language of Section 5 of the L&HWC Act (33 U.S.C. § 905), which is nearly identical with the FECA (5 U.S.C. § 8116(c) (formerly 757(b)). See side-by-side quotation of these provisions above. Three cases from this Court bearing on this point are briefly discussed below.

In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). This Court held that where the injuries to the longshoremen-employee occurred through the fault of his employer, the third party shipowner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the L&HWC Act. This Court made the following comments concerning Section 905 of the L&HWC Act:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability *of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment.*" (Emphasis by the Court in part, and in part ours)

The words "claiming under or through such employee" are a specific interpretative gloss applied by this Court in its analysis of the exclusive remedy of the L&HWC Act. It is obvious from the opinion as a whole, and from the cited language in particular, that

this Court considers the exclusive remedy provision to apply only to "the employee, and those claiming under or through him." Immediately following that quote, this Court continued:

> "In return, the employee, *and those claiming under or through him*, are given a substantial quid pro quo in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. On the other, hand, the act prescribes no quid pro quo for a shipowner that is compelled to pay a judgment obtained against if for the full amount of a longshoreman's damages." (Emphasis added)

Again the Court uses the phrases "employee and those claiming under or through him." In the analysis of this Court, the exclusive remedy provisions apply to them specifically in return for their exchange of a guaranteed recovery for possible tort liability.

A reading of the statute itself confirms the interpretation given by this Court in *Ryan*. The exclusive remedy provisions apply to "anyone . . . entitled to recover damages from such employer . . . on account of such injury or death . . ." The employee, and those claiming through him, recover "on account of such injury or death". That is, they recover because of the fact of employment and the fact of injury or death, nothing more. This is the right they have obtained as a result of surrendering their right to bring a tort action. They do not recover "on account of" the negligence of or fault of the employer.

Third parties, or those not claiming under or through the employee, *do not* recover from the employer "on account of such injury or death". To recover from the employer, they must show negligence, fault or the existence of an obligation to indemnify. If they do recover, it will be "on account of" such negligence, fault or indemnity.

Additionally, what this Court said in *Weyerhaeuser Steamship Co. v. U.S.*, (1963) 372 U.S. 597, 10 L. Ed. 2d 1, 83 S.Ct. 926, clearly set out the rationale and guidelines to be followed in this type of case even though it involved Section 757(b), now Section 8116(c) of the FECA. Because of the similarity in the exclusive remedy provisions of both the L&HWC Act and FECA, this reasoning should be applied in the interpretation of Section 905 of the L&HWC Act.

In *Weyerhaeuser* a collision occurred between a dredge owned by the United States and a ship owned by the plaintiff. It was found that the collision was a result of the mutual fault of both parties. A government employee, who was on board the dredge at the time was injured. He received compensation benefits under the FECA, and also brought a tort suit against the plaintiff. The plaintiff settled the case for $16,000.00 and then sought to include the $16,000.00 as part of its damages (in mutual fault ship collision cases, each party is entitled to recover one-half of its damages from the other party).

The United States objected to plaintiff's inclusion of the $16,000.00 as part of its damages on the basis that its sole liability under 5 USCA § 757(b) (now § 8116(c)), was to pay compensation to its injured

employee under the FECA. This Court held that the exclusive liability provision of § 757(b) did not prevent the plaintiff from including the $16,000.00 as a part of its damages. Stated in other terms, this Court held that the Government's obligation to pay compensation benefits to its injured employee under FECA *was not* its exclusive obligation. In reaching its decision, this Court was of the opinion that the purpose of the law (a workmen's compensation law) must be considered. It is a compromise between employers and employees in that it provides swift and assured compensation to the worker who is injured while on the job, regardless of who is at fault, while simultaneously taking away the employee's right to sue in tort and assuring the worker of a much smaller amount of money than he would recover in a tort suit. In *Weyerhaeuser* this Court found that the purpose of the exclusive liability provision (§ 757(b), now § 8116(c)) " — was to establish that, *as between the Government on the one hand and its employees and their representatives or dependents on the other*, the statutory remedy was to be exclusive. *There is no evidence whatever that Congress was concerned with the rights of unrelated third parties* —". (Emphasis ours) (83 S.Ct. 926, p. 929). In this case, this Court makes it clear that Section 757(b) (now § 8116(c)) of the FECA does not provide for the exclusive liability that the Government has to face.

Although the case involves a special rule (divided damages in mutual fault collisions) and thus might be said to be distinguishable from other cases involved § 757(b) of FECA or § 905 of the L&HWC Act, it appears that this Court did not intend for *Weyerhaeuser* to be distinguishable. This intent is illustrated by the fact that the Court compared § 757(b) to its counterpart in

the L&HWC Act and then cites cases in which, despite § 905 of the L&HWC Act, it was held that that section did not abrogate actions by third parties who sought indemnity from the injured worker's employer. See, also, *Federal Marine Term., Inc. v. Burnside Ship Co.*, (1969), 394 U.S. 404, 421, 89 S.Ct. 1144, 1149, 1153, 1154, 22 L.Ed.2d 371.

There have been other cases (not involving mutual fault ship collisions) that specifically follow the holding in *Weyerhaeuser*. These cases make it clear that the holding in *Weyerhaeuser* is not limited to the above mentioned admiralty doctrine.

Drake v. Treadwell Construction Co. v. U.S., (1963) 372 U.S. 772, 10 L.Ed.2d 136, 83 S.Ct. 1102, 299 F.2d 789, is such a case. It clearly shows that it was not this Court's intent to limit its holding in *Weyerhaeuser* to mutual fault ship collision cases. Drake, a Government employee, was injured when an expansion tank manufactured by Treadwell exploded. Drake sued Treadwell, who filed a third party claim against the United States seeking indemnity or contribution. The district court found that Treadwell was at fault and awarded judgment in favor of Drake. *On the third party claim the court found that the United States was also at fault and awarded contribution to Treadwell.* On appeal, the appellate court reversed the award of contribution on the ground that § 757(b) precluded an action by a third party against the Government. Writs were accepted by this Court and vacated the judgment and remanded the case to the district Court for a decision in accord with its holding in the *Weyerhaeuser* case. The district court in order dated May 24, 1963 and

July 9, 1963 specifically ruled that § 757(b) *did not preclude the third party action in which indemnity or contribution was sought.*

Other cases in which the same decision was reached are *Hart v. Simmons*, (1963) 223 F.Supp. 109; *Wallenius Bremen v. U.S.*, (1969) 409 F.2d 994, 12 ALR Fed. 606.

It is the position of petitioners that they should not be denied the right to show that Bettis was only at least technically, passive or secondarily at fault and Charles Wheatley Company was actively and primarily at fault and thereby entitled to indemnity or contribution from Wheatley. It is petitioners' further position that by so allowing indemnity against Wheatley, the ultimate loss is thereby placed upon the actor whose fault caused the injury. As pointed out in several cases, if this is done, the one best able to eliminate the risk is given the greatest incentive to do so. As pointed out in several cases also, it would be wrong to assess damages against a non-negligent or passively negligent defendant for loss or injury suffered solely as the result of active negligence of another party, regardless of the absence of a contractual relationship between the parties. As pointed out by the Court in the case of *Tri-State Oil Tool Indust., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, *the right of indemnity is based upon the principle that everyone is responsible for his own negligence and if another person has been compelled by judgment to pay the damages which ought to have been paid by the wrongdoer, they may recover from them.* This right exists independent of statute and whether or not contractual relations exist between the parties, and

whether or not the negligent person owed the other a special or particular legal duty not to be negligent. The Court in the *Tri-State* case quoted with approval from Prosser on Torts, the following:

> " 'In Prosser on Torts, § 48 at 279 (3d ed.), it is said:
>
> " '*The right to indemnity may, * * * arise without agreement, and by operation of law to prevent a result which is regarded as unjust or unsatisfactory.* Although the ancient specious argument that the courts will not aid one tortfeasor against another because no one should be permitted to found a cause of action on his own wrong, would appear to apply quite as fully to indemnity as to contribution, the courts have been much more disposed to reject it where indemnity is involved.
>
> " 'Thus it is generally agreed that there may be indemnity in favor of one who is held responsible solely by imputation of law because of his relation to the actual wrongdoer, as where an employer is vicariously liable for the tort of a servant or an independent contractor; or an innocent partner or carrier is held liable for the acts of another, or the owner of an automobile for the conduct of the driver . . .
>
> " '*The principle is not, however, limited to those who are personally free from fault. * * * Again, it is quite generally agreed that there*

may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible * * *." (Emphasis added)

Tri-State Oil Tool Indust., Inc. v. Delta Marine Drilling Co., 410 F.2d 178, at p. 182.

Based on the above cases, this Court should grant a review to affirm that the absence of a contractual relationship between vessels in collision cases should not alter the principles expressed in the existing Federal Compensation Act cases in regard to Congressional intention in passing these statutes. As the Government argued in this Court in the *Ryan* case, "the Compensation Acts, in conferring immunity on the employer from common lawsuits by the employee and his dependents did not mean to free the employer from suits by outsiders."

CONCLUSION

In view of the conflict in the various Circuits of the Court of Appeals and the apparent failure of the lower courts to follow the lead set by this Court in *Ryan*, *Weyerhaeuser* and other decisions, and the fact that fundamental injustice will result if the position taken by the Fifth Circuit Court of Appeals in this case is maintained, it is respectfully submitted that a writ of review should be granted in this case.

Respectfully submitted,

PUGH, BOUDREAUX
& GACHASSIN,
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September ____, 1975.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of September, 1975.

NICHOLLS PUGH, JR.

APPENDIX A

United States Court of Appeals
Fifth Circuit
Office of the Clerk

May 5, 1975

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW NO. 74-1667 WHITE V. CHARLES WHEATLEY COMPANY

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure govern costs, petitions for rehearing and mandates, respectively. Local Rule 15 has been amended to provide: "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to the recent amendment to Local Rule 7 which now provides: "Appointed counsel shall, in the event

of affirmance of other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
CLERK
/s/ ANNE G. PARENT

enc.

cc: Mr. Timothy J. McNamara
Mr. Nicholls Pugh, Jr.
Mr. Bob F. Wright
Mr. Fred H. Sievert, Jr.
Mr. James Nieset

Albra Christine WHITE, Individually, etc., et al., Plaintiffs,

versus

TEXAS EASTERN TRANSMISSION CORPORATION et al., Defendants.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY and the Bettis Corporation, Defendants-Third-Party Plaintiffs-Appellants,

Texas Eastern Transmission Corporation

and

The Fidelity and Casualty Company of New York, Defendants-Third-Party Plaintiffs,

versus

CHARLES WHEATLEY COMPANY, Third-Party Defendant-Appellee,

Vinson Supply Company, Third-Party Defendant,

Home Insurance Company, Intervenor.

No. 74-1667.

United States Court of Appeals, Fifth Circuit.

May 5, 1975.

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM and SIMPSON, Circuit Judges, and NICHOLS*, Associate Judge.

SIMPSON, Circuit Judge:

Murray Granvil White, an employee of the Charles Wheatley Co. (Wheatley), was fatally injured when component parts of a Wheatley Univalve Launch Package[1] upon which he was working exploded. The launch package had been sold by Wheatley to Texas Eastern Transmission Corporation (Texas Eastern) and was installed on a fixed offshore drilling platform located in Block 280 of the Gulf of Mexico offshore of Cameron, Louisiana. White's widow and daughter were entitled to and received compensation from Wheatley's insurance carrier in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C. § 901 et seq. (hereinafter "L & H").[2]

Also instituted by White's survivors was the present litigation, a civil tort action for damages against

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* Of the United States Court of Claims, sitting by designation.

1 The Univalve Launch Package was part of an apparatus used for cleaning moisture from within natural gas transmission lines connecting offshore drilling platforms. The launcher would disgorge 24 inch balls known as "pigs" into the gas transmission lines when actuated. The actuator, (a "pig launcher" in oil field vernacular) among other uses, opens and closes oil field valves, or actuates them. At the time he sustained his fatal injuries, Murray White was installing a device that would automatically release the balls at predetermined intervals. It is our understanding that the launch system had theretofore required manual operation of the actuator.

2 The Outer Continental Shelf Lands Act, Title 43, U.S.C. § 1331 et seq., provides that the compensation law applying to injuries on these fixed, offshore drilling platforms is that specified in the L & H Act, 43 U.S.C. § 1333(c).

Texas Eastern and against the Bettis Corporation, manufacturer of the actuator valve incorporated in the Wheatley launch system.[3]

Bettis Corporation and its insurer, St. Paul Fire and Marine Insurance Company (hereafter collectively referred to as "Bettis") filed third party complaints against Wheatley.[4] Bettis' primary position is that it is entitled, in the event of a judgment holding it liable for damages to White's survivors, to contribution or to indemnity in tort for all or part of such damages.[5]

Wheatley moved to dismiss Bettis' third-party complaint on grounds that the exclusivity provision of L & H, Title 33, U.S.C. § 905, as construed by this court,

---

3 The Wheatley launch system was assembled from a number of component parts, some of Wheatley's manufacture and others purchased by Wheatley from independent suppliers such as Bettis Corporation.

4 A third party claim against Wheatley was also filed by Texas Eastern and, subsequently, by the Vinson Supply Company (Vinson). The third-party complaint of Texas Eastern alleged a contractual right to indemnity based on language appearing on the purchase order forms executed between Texas Eastern and Wheatley. Wheatley made no motion to dismiss Texas Eastern's complaint, and its viability is not now an issue before this court.

Vinson Supply Company, like Bettis, was a supplier of component parts for the Wheatley-assembled launch system. Vinson's third party complaint against Wheatley was filed after the entry of judgment against Bettis on its third-party complaint and before this appeal was taken. The district court has withheld disposition of the Vinson complaint pending our decision in this appeal.

5 Bettis also claimed the right to indemnity based on Wheatley's breach of an implied warranty that it would use the Bettis supplied equipment only in accordance with the specifications and recommendations supplied by Bettis. This is an apparent attempt to invoke the right of indemnification recognized in Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, in a non-vessel oriented context. We clearly rejected any such attempts in Ocean Drilling and Exploration Co. v. Berry Bros. Oilfield Service, Inc., 5 Cir. 1967, 377 F.2d 511, 513 & n.3, cert. denied, 1967, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118.

precludes such indemnity claims against an employer. The district court entered a Rule 54(b) F.R.Civ.P. order granting Wheatley's motion to dismiss, and this appeal followed. For the reasons advanced below, we affirm the order of the district court.

Our discussion necessarily begins, and to all effective intents and purposes, ends, with Ocean Drilling and Exploration Co. (ODECO) v. Berry Bros. Oilfield Service, Inc., 5 Cir. 1967, 377 F.2d 511, cert. denied 1967, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (*ODECO*). In that case, employees of Berry Bros. were injured while performing repair work on an offshore drilling platform owned by ODECO. The injured employees received L & H compensation from their employer, and also filed suits in tort against ODECO alleging ODECO's negligence in failing to furnish a safe place to work. ODECO in turn filed a third-party complaint for indemnity in tort and contract against Berry Bros. The district court granted Berry Bros.' motion to dismiss the third-party complaint, and we affirmed on appeal.

After disposing of ODECO's claimed contractual right to indemnity (see note 5, supra), we turned to a consideration of the very issue which is again before us today: "whether a claim for indemnity remains available to ODECO [by analogy, here to Bettis] under maritime tort principles." 377 F.2d at 513. We held, after citing the exclusive liability provision of L & H, 33 U.S.C. § 905,[6] as follows:

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6 Title 33, U.S.C. § 905, prior to the 1972 amendment, read as follows:

§ 905. *Exclusiveness of liability.*

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other lia-

It is thus apparent that the Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, *thereby eliminating any basis which may have existed for indemnification on a tort theory*. Thus, while the employer may continue, even in spite of the exclusive liability provision of the Act, to remain liable for indemnity on the basis of an express or implied contractual obligation, in the absence of such obligation, as here, there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer. See United Air Lines, Inc. v. Wiener, 9th Cir. 1964, 335 F.2d 379, 402-404, cert. dismissed, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549; Halliburton Co. v. Norton Drilling Co., supra, 302 F.2d [431] at 434; Brown v. American-Hawaiian S.S. Co., 3d Cir. 1954, 211 F.2d 16, 18; American Mut. Liab. Ins. Co. v. Matthews, 2nd Cir. 1951, 182 F.2d 322, 323-336.

377 F.2d at 514-515. (Emphasis added)

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bility of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Mar. 4, 1927, ch. 509, § 5, 44 Stat. 1426.)

The effective date of the 1972 amendments to L & H was after the institution of this action below, and the amendments do not enter into the disposition of this appeal. But, for the legislative history of the amendments see 1972 U.S. Code Cong. and Admin. News, p. 4698 et seq.

Without more, this would seem to end the matter. For, it is clear from a reading of *ODECO* and other cases[7] that there must be some underlying tort liability predicated on a breach of the employer's duty in order for a right of indemnity to arise in a third party. Here, the only breach of duty — and the only resulting theoretical liability — of Wheatley that could be asserted was a duty owed to its employee to assemble the launch package in a non-negligent manner so as to prevent injury to the employee. It is clear beyond doubt under *ODECO* that § 905 of L & H has extinguished this liability in favor of a compensation scheme. Thus, there remains no underlying tort liability to support Bettis' indemnity claim.

Appellants present an argument by analogy with cases decided under the exclusive liability provision of the Federal Employees' Compensation Act (FECA), Title 5, U.S.C. § 8116(c), because of the similarity of the language of FECA to that of L & H. We reject application of these decisions as inapposite to our decision of this appeal for reasons we will briefly set forth.

In the first place, conceding the persuasiveness of such cases in the absence of an authoritative construction of § 905 of L & H, such a situation is simply not present. Secondly, the Supreme Court decisions which have permitted some forms of indemnity under § 8116(c) of FECA may be distinguished on their facts

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7 See, e. g. Loffland Brothers Co. v. Roberts, 5 Cir. 1967, 386 F.2d 540, cert. denied 1968, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830; Drewery v. Daspit Brothers Marine Divers, Inc., 5 Cir. 1963, 317 F.2d 425.

from the instant controversy.[8] Finally, the lower federal courts are themselves divided as to the proper interpretation of § 8116(c) of FECA as applied to tort indemnity claims.[9]

Likewise without merit is appellant's further contention that the precedential vitality of *ODECO's* clear holding has been eroded by subsequent decisions in this circuit.[10] Very recently, in Aetna Casualty & Sure-

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8 In Weyerhaeuser S.S. Co. v. United States, 1963, 372 U.S. 597, 83 S.Ct. 926, 10 L.Ed.2d 1, the Court held that the exclusive liability provision of FECA yielded to the time-honored rule of divided damages in mutual fault admiralty collision cases. The Court indicated that it considered this result dictated by Congress' expressly providing in the Public Vessels Act, Title 46, U.S.C. § 781 et seq., that the United States be liable just as private shipowners in mutual fault collision cases.

In Treadwell Const. Co. v. United States, 1963, 372 U.S. 772, 83 S.Ct. 1102, 10 L.Ed.2d 136, the Court simply vacated a holding of the court of appeals and remanded for further consideration by the district court the question whether § 8116(c) barred indemnity claims where the Federal Tort Claims Act, Title 28, U.S.C. § 2671 et seq., was applicable in the light of the Court's holding in *Weyerhaeuser*.

These cases are not dispositive of the L & H exclusivity issue before us here.

9 *See*, Annot., 12 A.L.R.Fed. 616, §§ 5 and 6 (1972) (Supp. 1974), for a collecting and analysis of the divergent views on the reach of FECA's exclusive liability provision.

10 Appellant cites Sandoval v. Mitsui Sempaku K.K. Tokyo, 5 Cir. 1972, 460 F.2d 1163, and Loffland Bros. Co. v. Roberts, 5 Cir. 1967, 386 F.2d 540, cert. denied 1968, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830, in support of his argument. *Sandoval* involved the FECA and need not detain us. See nn. 8-9 and accompanying text, supra. In *Loffland* an employee of a casing contractor was injured in the course of well drilling on an offshore platform similar to the location of Murray White's fatal injury. In *Loffland*, Roberts, an injured employee of a casing company, brought suit against Loffland Bros., the drilling contractor, for damages, and Loffland Bros. filed a third-party claim for indemnity against O. D. Casing Crews, Inc., Roberts' employer. The district court dismissed the third-party complaint and we affirmed without referring to the exclusive liability provision of L & H. We found, instead, that the third party claim for tort indemnity could not stand because there

ty Co. v. Service Contracting, Inc., 5 Cir. 1973, 490 F.2d 299, we adhered to the rule of *ODECO* in unmistakable language:

> [H]aving paid workmen's compensation to Laster in accordance with the exclusive liability provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., Service Contracting was not subject to any independent tort liability to its employees. Without this underlying tort liability, Service Contracting could not have been liable for indemnity in the absence of a written contract. Ocean Drilling & Exploration Co. v. Berry Brothers Oil Field Service, Inc., 377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849 [88 S.Ct. 102, 19 L.Ed.2d 118] (1967). *See* General Electric Co. v. Cuban American Nickel Co., 396 F.2d 89 (5th Cir. 1968); Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (5th Cir. 1962).
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> 490 F.2d at 300-01.

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was no evidence in the record of any negligence on the part of the casing company other than the negligence of the injured employee. Under the doctrine of Drewery v. Daspit Bros. Marine Divers, Inc., 5 Cir. 1963, 317 F.2d 425, we declined to impute the employee's negligence, which resulted only in injuries to the employee himself, to his employer. There was, therefore, no underlying tort liability upon which Loffland Bros. could base its claim for indemnity.

We do not read this court's reliance on a pre-existing common law rule rather than on the exclusive liability provision of L & H, never mentioned in the opinion, as an implicit retreat from the holding in *ODECO*. Indeed the theory of indemnity in both *ODECO* and *Loffland Bros.* is the same: absent some underlying tort liability of the employer, there can be no third-party claim for tort indemnity against the employer. That the court in *Loffland Bros.* elected to apply this theory under common-law principles rather than under the exclusive liability provision of the L & H is of little significance in assessing *ODECO*'s continuing potency as precedent.

Guided by such undeviating precedent from this court, the district court was clearly justified in its dismissal of Bettis' third-party claim for tort indemnity against Wheatley.

Affirmed.

APPENDIX B

United States Court Of Appeals
Fifth Circuit

Office of the Clerk

June 30, 1975

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

TO ALL COUNSEL OF RECORD

No. 74-1667 - Albra Christine White, Etc., Et Al. vs. Texas Eastern Transmission Corp., Et Al.; St. Paul Fire and Marine Insurance Co. and the Bettis Corp.; Texas Eastern Transmission Corp. and the Fidelity & Casualty Co. of New York vs. Charles Wheatley Co.; Vinson Supply Co.; Home Insurance Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ BARBARA KREI
Deputy Clerk

cc: Mr. Timothy J. McNamara
Mr. Nicholls Pugh, Jr.
Mr. Bob F. Wright
Mr. Fred H. Sievert, Jr.
Mr. James Nieset

APPENDIX C

Filed: Nov. 15, 1973

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

ALBRA CHRISTINE WHITE,
INDIVIDUALLY, ETC.

versus C.A. No. 17,994

TEXAS EASTERN TRANSMISSION
CORPORATION, ET AL

ORDER MAKING EXPRESS
DETERMINATION UNDER RULE 54(b)

Defendants, ST. PAUL FIRE AND MARINE INSURANCE COMPANY and BETTIS CORPORATION, having applied in open court on the 7th day of November, 1973, for an order expressly directing the entry of final judgment on the order of this Court dated the 7th day of November, 1973, upon an express determination that there is no just reason for delay, and the Court having heard oral argument in support of the said application, and in opposition thereto, and due deliberation having been had thereon, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, hereby

Determined that there is no just reason for delay in the entry of final judgment herein on the order of this

Court dated November 7, 1973, sustaining the motion by CHARLES WHEATLEY COMPANY to dismiss the third party complaint of ST. PAUL FIRE AND MARINE INSURANCE COMPANY and the BETTIS CORPORATION, and it is

ORDERED that such final judgment be entered herein forthwith.

Lafayette, Louisiana this 15th day of November, 1973.

/s/ R. J. PUTNAM
UNITED STATES DISTRICT
JUDGE

APPROVED:
DAVIDSON, MENOX, ONEBANE & DONOHOE,
ATTORNEYS FOR
CHARLES WHEATLEY COMPANY

TIMOTHY J. McNAMARA

APPENDIX D

Sandoval v. Mitsui Sempaku K.K. Tokyo, 460 F.2d 1163, (1972, 5th Cir.) (Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges)

A shipowner sued by an employee of the Panama Canal Company, in a third party action sought indemnity from the employer of the plaintiff. Mitsui, the shipowner was not guilty of any conduct sufficient to preclude recovery.

After finding Ryan indemnity, the Court stated:

"[6] — *Mitsui is likewise* entitled to indemnity from the Canal Company on a tort indemnity basis because *the Company violated a duty owed directly to the shipowner to exercise reasonable care to avoid the foreseeable harm of the shipowner's liability to Sandoval*. See Tri-State Oil Tool Indus., Inc. v. Delta Marine Drill. Co., 5 Cir., 1969, 410 F.2d 178, noted 44 Tul.L.Rev. 557, and cases cited therein. See also Federal Marine Term., Inc. v. Burnside Ship. Co., 394 U.S. 404, 421, 89 S.Ct. 1144, 1153-1154, 22 L.Ed.2d 371 (1969).

"[7] — Finally, the District Court concluded that Mitsui was foreclosed from seeking indemnity because the Federal Employees Compensation Act is the exclusive remedy available against the Company for

Ocean Drilling & Exp. Co. v. Berry Bros. Oilfied Service, 377 F.2d 511, (1967, 5th Cir.) (Before GEWIN, THORNBERRY and DYER, Circuit Judges)

An offshore platform owner sued by two employees of a repair contractor in a third party action, sought recovery by way of indemnity from the employer of the two plaintiffs. One of the main issues was "whether a claim for indemnity remains available to ODECO under maritime tort principles." (p. 513)

The Court made the following statement and conclusion:

"[3, 4] — Even assuming, however, as alleged in the third-party complaint, that any negligence on the part of ODECO was merely passive or secondary in character, we are nevertheless compelled to conclude that ODECO's claim for indemnity, not being based upon the violation of a contractual obligation, must fail under maritime law. Here, the injured claimants were entitled to and did, in fact, receive benefits from Berry Bros. under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., their injuries having occurred on a platform located above the Outer Continental Shelf in the Gulf of Mexico. *Section 5 of that Act*

those entitled to benefits of the Act. *This identical argument was rejected by the Supreme Court in Weyerhaeuser Steamship Company v. United States*, 372 U.S. 597, 601-604, 83 S.Ct. 926, 929-930, 10 L.Ed.2d 1 (1963). See also Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)."

(Emphasis ours) (pps. 1168-1169)

TORT INDEMNITY GRANTED

expressly states that its compensation provisions are exclusive of any other liability of an employer to its employees —

"— It is thus apparent that the Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, thereby eliminating any basis which may have existed for indemnification on a tort theory. —"

(Emphasis ours) (p. 514)

TORT INDEMNITY DENIED